

1 12. From February 22, 2011 until May 22, 2011 Smeader was out on Family Medical
2 Leave ("FML").

3 13. On May 10, 2011 had surgery to fuse the bulging disks in his neck at C6-7
4 together.

5 14. Although his FML ended, Defendant did extend Plaintiff's leave of absence, but
6 when Smeader's doctor indicated in a progress report on July 28, 2011 that Plaintiff would be off
7 work until August 28, 2011, Tuscany abruptly terminated Smeader's employment on July 31,
8 2011.

9 15. A progress report from Smeader's doctor dated August 30, 2011 indicated that
10 Plaintiff could return to work on August 31, 2011 but could not lift more than five pounds and had
11 to avoid reaching over his shoulders.

12 **FIRST CAUSE OF ACTION**

13 **(For Disability Discrimination and Failure to**
14 **Accommodate in Violation of the ADA)**

15 16. Plaintiff Smeader incorporates the allegations set forth in paragraphs 1 through 15,
16 inclusive, as if fully set forth herein.

17 17. Plaintiff was diagnosed with a severe right shoulder sprain and a cervical strain
18 with a bulging disk at C6-7 in his neck by his doctor Hugh Bassewitz, MD. These ailments
19 substantially limited him in the major life activity of walking, standing, sitting, walking, carrying,
20 lifting and working, among other major life activities, and thus qualified Smeader as being
21 disabled under the ADA.

22 18. To accommodate these disabilities Plaintiff was put on FML from February 22,
23 2011 until May 22, 2011 and an additional medical leave of absence from May 23, 2011 to he was
24 terminated.

25 19. On July 31, 2011 Smeader was abruptly terminated when he was still not released
26 back to work. On August 31, 2011, Plaintiff was released back to work but could not lift more
27 than five pounds and had to avoid reaching over his shoulders.
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1 20. Had Tuscany continued to interact with Smeader and continued to accommodate
2 his disabilities, by among other things, extending his medical leave of absence until he was
3 physically able to return to the job he held prior to his injury, Plaintiff would have been able to
4 return to work as early as August 31, 2011 with restrictions.

5 21. In addition, Defendant could have found Smeader an alternative job which he was
6 able to perform with his restrictions once he received the approval to return to work by his doctor.

7 22. Plaintiff believes and will prove at trial that Tuscany terminated Plaintiff's
8 employment for pursuing his rights under the ADA, by among other things, requesting an
9 extension of his leave of absence to accommodate his disabilities.

10 23. As a direct and proximate result of Defendant violating Plaintiff's rights under the
11 ADA, Plaintiff has suffered, overall economic losses in earnings, bonuses, job benefits and
12 expenses, in an amount to be proven at trial which exceeds the minimum jurisdictional limits of
13 this Court.

14 24. As a direct and proximate result of Defendant violating Plaintiff's rights under the
15 ADA, Plaintiff has suffered indignity, mental anguish, humiliation, emotional distress,
16 nervousness, tension, anxiety, change in sleep patterns, depression, inconvenience and loss of
17 enjoyment of life and other pecuniary losses, the extent of which is not fully known at this time,
18 for which Plaintiff seeks damages in an amount in excess of the minimum jurisdictional limits of
19 the Court, also to be proven at the time of trial.

20 25. In acting as they did, Defendant knowingly, willfully, and intentionally acted in
21 conscious disregard of Plaintiff's rights. Their conduct was despicable, has subjected Plaintiff to
22 oppression, and it warrants an award of punitive and exemplary damages in favor of Plaintiff, in a
23 sum according to proof at trial.

24 26. Plaintiff claims the damages alleged herein, together with prejudgment interest as
25 provided by law, in a sum according to proof at trial.

26 27. Plaintiff has incurred, and continues to incur, attorney's fees in the prosecution of
27 his claims. Plaintiff therefore seeks an award of reasonable attorney's fees, in a sum according to
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1 proof at trial.

2 **SECOND CAUSE OF ACTION**

3 **(For Interference and Retaliation**

4 **in Violation of the FMLA)**

5 28. Plaintiff Smeader incorporates the allegations set forth in paragraphs 1 through 27,
6 inclusive, as if fully set forth herein.

7 29. This cause of action is brought pursuant to FMLA as it involves a claim by Plaintiff
8 for interference and retaliation in taking FML which is governed by the FMLA.

9 30. As set forth above Plaintiff was on FML from February 22, 2011 until May 22, 2011
10 and then was abruptly terminated on July 31, 2011.

11 31. Plaintiff believes and will prove at trial that his FMLA rights were interfered with
12 and he was terminated in retaliation for pursuing his rights under the FMLA.

13 32. As a direct and proximate result of Defendant violating Plaintiff's rights under the
14 FMLA, Plaintiff Smeader has suffered loss of income, including but not limited to past and future
15 wages, benefits, expenses, insurance, loss of back pay, front pay, other consequential damages,
16 pain and suffering and other damages to be proven at trial.

17 33. Defendant's violation of Plaintiff's rights under the FMLA were with deliberate
18 indifference to such rights or were willful, entitling Plaintiff to an award of liquidated damages
19 equal to double the amount of his actual damages.

20 34. Plaintiff claims the damages alleged herein, together with prejudgment interest as
21 provided by law, in a sum according to proof at trial.

22 35. Plaintiff has incurred, and continues to incur, attorney's fees in the prosecution of
23 his claims. Plaintiff therefore seeks an award of reasonable attorney's fees, in a sum according to
24 proof at trial.

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THIRD CAUSE OF ACTION

(For Tortious Discharge in Violation of State Public Policy -

Discharging Plaintiff for Filing a Worker's Compensation Claim)

36. Plaintiff Smeader incorporates the allegations set forth in paragraphs 1 through 35, inclusive, as if fully set forth herein.

37. This cause of action is brought pursuant to the public policy of the State of Nevada making it against said policy to discharge an employee in retaliation for filing a claim for worker's compensation. See *Hansen v. Harrah's*, 675 P.2d 394 (1984); *Torre v. J.C. Penny Co.*, 916 F.Supp. 1029 (D. Nev. 1996).

38. As set forth above Plaintiff filed a worker's compensation claim relating to his work related injuries which occurred on February 22, 2011.

39. Thereafter Smeader's employment with Tuscany was abruptly terminated on July 31, 2011.

40. Plaintiff believes and will prove at trial that he was terminated for filing and pursuing a worker's compensation claim under Nevada's Industrial Insurance laws pertaining to worker's compensation.

41. As a direct, foreseeable, and legal result of the Defendant's discharge of Plaintiff for filing and pursuing a worker's compensation claim, Plaintiff has suffered and continues to suffer, substantial losses in earnings, bonuses, job benefits and expenses, in an amount to be proven at trial which exceeds the minimum jurisdictional limits of this Court.

42. As a further direct, foreseeable, and legal result of the Defendant's discharge of Plaintiff for filing and pursuing a worker's compensation claim, Plaintiff has suffered indignity, mental anguish, humiliation, emotional distress, nervousness, tension, anxiety, recurring nightmares, depression, inconvenience and loss of enjoyment of life and other pecuniary losses, in an amount to be proven at trial which exceeds the minimum jurisdictional limits of this Court.

43. In acting as they did, Defendant knowingly, willfully, and intentionally acted in conscious disregard of Plaintiff's rights. Their conduct was despicable, has subjected Plaintiff to

1 oppression, and it warrants an award of punitive and exemplary damages in favor of Plaintiff, in a
2 sum according to proof at trial.

3 44. Plaintiff claims the damages alleged herein, together with prejudgment interest as
4 provided by law, in a sum according to proof at trial.

5 45. Plaintiff has incurred, and continues to incur, attorney's fees in the prosecution of
6 his claims. Plaintiff therefore seeks an award of reasonable attorney's fees, in a sum according to
7 proof at trial.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff Smeader demands judgment against Defendant as follows:

10 1. Declaring that the acts and practices complained of here are a violation of the ADA,
11 FMLA and Nevada public policy;

12 2. Enjoining and permanently restraining the violations by Defendant of the ADA,
13 FMLA and Nevada public policy;

14 3. For back pay and front pay for overall economic losses in earnings, bonuses, job
15 benefits and expenses, according to proof at time of trial;

16 4. For liquidated damages under the FMLA as an additional amount equal to the sum of
17 actual damages and interest;

18 5. For compensatory damages for mental and emotional distress, worry, indignity,
19 mental anxiety, mortification, depression, shame, grief, inconvenience and loss of enjoyment of life
20 and other pecuniary losses, all to Plaintiff's damage in a sum to be shown at the time of trial;

21 6. For punitive damages;

22 7. For attorney's fees and costs in an amount determined by the court to be reasonable;

23 8. For pre-judgment interest on all damages; and

24 9. For any other and further relief that the Court considers proper.

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DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury in this action.

DATED: 8/25/2015

LAW OFFICES OF MICHAEL P. BALABAN

BY: /s/ Michael P. Balaban
Michael P. Balaban
LAW OFFICES OF MICHAEL P. BALABAN
10726 Del Rudini Street
Las Vegas, NV 89141

EXHIBIT

A

EEOC Form 161-A (11/09)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE (CONCILIATION FAILURE)

To: Gregory Smeader
3301 Alameda 19 North #340
Dunedin, FL 34698

From: Honolulu Local Office
306 Ala Moana Blvd
Room 7-127
Honolulu, HI 96850



On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(e))

EEOC Charge No.	EEOC Representative	Telephone No.
487-2012-00139	Raymond Griffin, Jr., Investigator	(808) 541-3721

TO THE PERSON AGGRIEVED:

This notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

- NOTICE OF SUIT RIGHTS -

(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed **WITHIN 90 DAYS** of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission.

Enclosures(s)

Glory Gerwacio Saure,
Local Office Director

7/28/2015
(Date Mailed)

cc:

TUSCANY SUITES & CASINO
c/o Littler Mendelson, P.C.
ATTN: Noel E. Eidemore, Esq.
3899 Howard Hughes Parkway, Suite 309
Las Vegas, NV 89199